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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BROCK MACKINZIE MYERS,

Defendant and Appellant.

D074462

(Super. Ct. No. FMB1400119)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Rodney A. Cortez, Judge. Affirmed as modified in part; reversed in part; and remanded
with directions.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Susan Miller,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Brock Mackinzie Myers of second degree murder (Pen. Code, § 187, subd. (a);¹ count 1). The jury also found true Myers personally used a handgun in the commission of the murder as set forth in section 12022.5, subdivision (a). However, the jury found not true that Myers personally and intentionally discharged a firearm, which caused great bodily injury or death within the meaning of section 12022.53, subdivision (d).

The court sentenced Myers to prison for 15 years to life on count 1 as well as an additional consecutive term of three years for the section 12022.5, subdivision (a) enhancement.

Myers appeals, contending the court erred in denying his motion under section 1118.1 to dismiss the murder charge. To this end, Myers argues substantial evidence does not support his murder conviction. He also argues the trial court prejudicially erred in failing to sua sponte instruct the jury on mistake of fact.

We agree with Myers that the trial court abused its discretion in denying his section 1118.1 motion because substantial evidence does not support his conviction for murder. However, we conclude any error arising out of the trial's court's failure to provide a mistake-of-fact instruction was harmless. Although we find substantial evidence does not support Myers's conviction for murder, we determine the evidence supports a conviction for the lesser included offense of involuntary manslaughter. We therefore modify the verdict to convict Myers of involuntary manslaughter and modify

¹ Statutory references are to the Penal Code unless otherwise specified.

the judgment accordingly. We remand this matter to the superior court to resentence Myers in accordance with this opinion.

FACTUAL BACKGROUND

Prosecution

On March 1, 2014, Myers along with fellow Marines S.K., J.H., C.S., K.T., J.M., and T.K. went to the desert to go shooting. Myers and S.K. were good friends. After shooting, the group split up with Myers and K.T. staying at C.S.'s house while the others stayed at a hotel.

The next day, Myers, S.K., and K.T. spent the day together. They purchased several cases of beer and were drinking "a lot" throughout the day. That evening, Myers wanted to shoot a flashing street sign; so, K.T. and S.K. accompanied Myers to the sign where he fired at it about 10 times. Myers admitted that shooting the sign was "pretty dumb."

Later that night, Myers, S.K., and K.T. went to C.S.'s house where they grilled food and continued to drink beer. C.S., J.M., J.H., and K.T. also hung out at C.S.'s house for about 15 to 20 minutes. Myers, K.T., and C.S. were going to stay at C.S.'s house for another night, but everyone else planned to return to the base. J.H. was going to drive the others back to the base and got into his truck, telling everyone to load up. J.H. was in the driver's seat, and J.M. was in the front passenger seat. S.K. sat behind J.H., and T.K. sat in the other rear passenger seat.

As they were about to leave, Myers walked up to the truck and asked S.K. for a lighter. S.K. said no. Myers asked for it again. S.K. told Myers, "If you put that pistol in

my mouth and pull the trigger, I'll give you this lighter." The two friends were joking and there was no indication of ill will or anger between them. Myers took his pistol out of his holster and released the magazine. S.K. opened his mouth and stuck out his tongue. Myers then put the gun in S.K.'s mouth and pulled the trigger. The gun fired, killing S.K.

When the police arrived, Myers was sitting on the ground talking on his cell phone. Myers was "[h]ysterical" and told the police he had accidentally shot his best friend, and he was going to jail for a long time. After Myers was handcuffed and placed in the patrol car, he began screaming and banging his head against the window.

J.M. told the police that Myers had "rack[ed]" the gun or "locked one back," meaning Myers had pulled the slide back toward the rear of the gun, putting a bullet in the chamber. J.M. told the police that he did not know what Myers was doing because there was still a bullet in the chamber. J.M. said that he did not see Myers eject a bullet from the chamber before putting the gun in S.K.'s mouth. Neither T.K. nor J.H. saw Myers "clear" the gun before he shot S.K.

At the police station, Myers waived his *Miranda*² rights and agreed to talk to the police. He described the dynamic among the Marines: "[W]e always joke around with [our guns] because when we start drinking we start caring less and less, that's how a group of Marines are [*sic*], like, so we'll sit there and pull the hammer back and click, you know, like just, I don't know."

² *Miranda v. Arizona* (1966) 384 U.S. 436.

Myers did not believe he had any rounds in the chamber when he shot S.K. Myers said that S.K. challenged him to shoot S.K. so Myers pointed his gun at him. Myers then pulled the trigger, expecting the gun to "dry fire." Myers stated, ". . . I guess, I don't know . . . guess [I] left a round in the chamber or when it loaded or something and" When asked by the police what made him put his gun in S.K.'s mouth, Myers responded that he was "[j]ust being drunk . . . and stupid." He stated that he couldn't "honestly tell [the police] why [he] did it." Myers admitted that he did not know what was going to happen to him but thought he would go "to jail for a very long time."

Myers admitted that he had shot the street sign and, after doing so, put another magazine in his gun. Myers stated that when he is shooting, he will insert the magazine in the gun and then "slide it, load it that way." He said that he loaded his gun that way after shooting the sign.

A district attorney investigator testified that he served 28 years in the Marines. He stated that Marines are taught four safety rules: to treat every weapon as if it was loaded; to keep your finger straight and off the trigger until you intend to fire; to never point your weapon at anything you do not intend to shoot; and to keep your weapon on safe until you intend to fire. According to the investigator, Marines must demonstrate that they understand and will follow the four safety rules. The investigator testified that to properly unload a firearm the safety must be on the weapon, the magazine must be taken out, and the slide locked to the rear to eject any bullets that are in the chamber. The investigator also explained that "racking" a gun refers to a live round being placed in the

chamber and, when a gun is racked, it makes a sound like metal to metal. Per the investigator, a "brass check" would take "[m]illisecons."³

In 2012, J.M. and Myers were training at a firing range. Myers's rifle jammed. Instead of following the proper procedure to clear the jam, Myers fired the rifle. The bullet hit the ground and came within several inches of hitting J.M.

Defense

Myers testified in his own defense. He stated that the day he shot S.K., he drank about 12 beers. S.K. was sitting in the backseat of the truck when Myers approached him. Myers had his gun in his right hand and a cigarette in his left hand. Myers asked S.K. for a lighter or a cigarette. S.K. responded "something to the extent of like no balls or something along those lines like—." Myers and S.K. were not arguing but were laughing. Myers interpreted the statement "no balls" like a dare.

Myers thought his gun was in "condition three," meaning there's a magazine inserted in the pistol grip but there is not a round in the chamber. Myers explained that when he pulled the trigger he was expecting the hammer to go forward and the gun to "dry fire." Myers did not believe the gun was loaded when he pulled the trigger. He also stated that he did not "[chamber] a round" and did not know how the bullet got into the chamber. Myers testified that if he had known his gun was loaded, he would not have pointed it at anyone.

³ A "brass check" is a method of checking the gun to ensure no round is in the chamber. Myers testified that he could perform a brass check in a matter of seconds, but he did not perform one on the night he shot S.K. He also admitted that he did not follow many of the safety rules when he shot S.K.

DISCUSSION

I

MYERS'S SECTION 1118.1 MOTION

A. Myers's Contention

Myers asserts the trial court erred when it denied his motion under section 1118.1 to dismiss the murder charge. He maintains sufficient evidence does not support a finding of implied malice.

B. Background

At the close of the prosecutor's case-in-chief, Myers moved, under section 1118.1,⁴ to dismiss the second degree murder charge because there was no evidence of express or implied malice. Myers's trial counsel pointed out that S.K. and Myers were joking and S.K. died in a "freak accident."

The prosecutor argued a jury could find implied malice because Myers "acted with a disregard towards the safety. He did a dangerous maneuver with his weapon, and it—he had total disregard for the life of another." The court agreed, explaining:

"The Court finds the evidence presented does support it going to the jury on second-degree murder. The evidence is substantial as to all elements. They [(the jurors)] will be

⁴ Section 1118.1 states: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right."

the ones to make the decision whether or not second-degree murder applies or lesser offense or no offense was committed. So your motion's denied."

C. Analysis

When ruling on a motion under section 1118.1, a trial court applies the same sufficiency of evidence standard applied by appellate courts in reviewing convictions. On appeal from a denial of such a motion, we independently review the sufficiency of the evidence at the point the motion was made. (*People v. Maciel* (2013) 57 Cal.4th 482, 522.)

When considering a defendant's challenge to the sufficiency of the evidence, we review the entire record most favorably to the judgment to determine whether the record contains substantial evidence from which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. We do not reweigh evidence or reassess a witness's credibility and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We ask whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the allegations to be true beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) If the circumstances reasonably justify the jury's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

Second degree murder is an unlawful killing with malice aforethought, but without the willfulness, premeditation, and deliberation necessary for first degree murder.

(§§ 187, subd. (a), 189; *People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 697.) By contrast, involuntary manslaughter is an unlawful killing without malice "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b); see *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1082.) For purposes of the general murder statutes (§§ 187-189), malice may be express or implied (§ 188). "Malice is implied when the killing is proximately caused by 'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " (*People v. Knoller* (2007) 41 Cal.4th 139, 143.)

An accidental shooting can be second degree murder or involuntary manslaughter depending on the defendant's knowledge. (See *People v. Thomas* (2012) 53 Cal.4th 771, 814-815 [conviction for second degree murder for a claimed accidental shooting during an argument]; *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1142-1143 (*Mehserle*) [conviction for involuntary manslaughter when a police officer mistakenly shot victim].) The mental state for involuntary manslaughter differs from the mental state for implied malice murder. " 'Implied malice contemplates a subjective awareness of a higher degree of risk than does gross [(i.e., criminal)] negligence, and involves an element of wantonness which is absent in gross negligence. [Citations.]' [Citation.] 'A finding of gross negligence is made by applying an *objective* test: if a *reasonable person* in defendant's position would have been aware of the risk involved, then defendant is

presumed to have had such an awareness. [Citation.] However, a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a subjective standard.' " (*Mehserle* at pp. 1141-1142; *People v. McNally* (2015) 236 Cal.App.4th 1419, 1426 (*McNally*) [" '[t]he state of mind of a person who acts with conscious disregard for life [(i.e., implied malice)] is, "I know my conduct is dangerous to others, but I don't care if someone is hurt or killed." ' "].)

Here, there is no evidence of express malice. Instead, the issue before us is whether substantial evidence supports a finding of implied malice. Myers argues substantial evidence supporting such a finding does not exist because he did not intend to kill S.K. It is undisputed that the two men were good friends and were joking around on the night in question. S.K. dared Myers to put the gun in his mouth and pull the trigger. Myers dropped the magazine from the gun before he pulled the trigger. Myers believed that the gun was not loaded.

Myers also points out that after the gun discharged, he was hysterical that he had shot his best friend. He remained distraught when the officers arrived. Myers told the officers that he had shot S.K., and it was an accident. In short, Myers claims that the evidence does not establish that he believed the gun was loaded or that he exhibited a conscious disregard for life.

In contrast, the People argue that Myers "was aware his conduct of putting a loaded firearm in [S.K.]'s mouth and pulling the trigger without checking to see if the gun was loaded or following the safety rules he had been taught posed a risk to [S.K.]'s life, but consciously disregarded the risk." The core of the People's argument is that the gun

was loaded, and Myers did not do enough to ensure that it was not loaded. To this end, the People focus on Myers's admission that he did not check to see if there was a bullet in the chamber before putting the gun into S.K.'s mouth as well as his acknowledgment that he did not follow the safety rules in handling the gun. The People also point out that Myers had been drinking and that he stated he kind of stops caring when he drinks and then messes around.⁵

In addition, the People emphasize that shortly after the incident, J.M. told the police that he observed Myers "lock[] one back" before he put the gun in S.K.'s mouth, which would have placed a bullet in the chamber of the gun.⁶ Moreover, at trial, J.M. stated that he believed there was a bullet in the chamber because he did not see Myers's "clear it" or "eject the bullet" to make sure there was no bullet in the chamber. Nevertheless, J.M. also told the police that Myers and S.K.'s conversation about the lighter was not serious, they were "playing with each other," and that S.K.'s death "appeared to be a freak accident."

With this background in mind, it is apparent that the People's claim that substantial evidence supports the jury's finding of implied malice relies on what Myers should have done to check the chamber of his gun and the fact that he did not follow safety guidelines.

⁵ The People are relying on Myers's statements during his police interview. He told the police that whenever he and S.K. drank, they "kind of like stop caring Our guns would be unloaded, but we'll, like, just point them around and like do, I don't know, it's hard to explain, we're just ultimately being stupid with them."

⁶ At trial, J.M. testified that he did not remember telling a detective that he thought Myers locked the gun back.

However, the evidence relied on by the People falls woefully short of establishing that Myers actually appreciated the risk of placing a loaded gun in S.K.'s mouth and pulling the trigger.⁷ He did not believe the gun was loaded. He was joking around with S.K. at the time he placed the gun in his mouth. He told the detective that he and S.K. often acted stupid with their guns when they had been drinking. Simply put, we conclude there is no evidence that Myers actually appreciated the risk involved; that he knew his conduct was dangerous to S.K. and did not care if S.K. was hurt or killed. (See *Mehserle, supra*, 206 Cal.App.4th at p. 1142; *McNally, supra*, 236 Cal.App.4th at p. 1426.) As such, this matter appears to be more akin to involuntary manslaughter cases involving the negligent handling or discharging of a firearm. (See, e.g., *In re Dennis M.* (1969) 70 Cal.2d 444, 449; *People v. Walls* (1966) 239 Cal.App.2d 543, 546-547.) We thus conclude the trial court erred in denying Myers's motion to dismiss the murder count. Substantial evidence does not support Myers's conviction of second degree murder.

II

RETRIAL

Although we determine substantial evidence does not support Myers's conviction of second degree murder, we need not remand this matter to the superior court for a retrial on a lesser included offense (here, involuntary manslaughter) if we find substantial

⁷ The People imply that the jury disregarded Myers's testimony that he believed the gun was not loaded. However, in making this argument, the People do not address the fact that the jury found not true the allegation that Myers personally and intentionally discharged a firearm, which caused great bodily injury or death within the meaning of section 12022.53, subdivision (d).

evidence supports such a conviction. "When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed." (§ 1181, subd. (6); see *People v. Navarro* (2007) 40 Cal.4th 668, 675-676.)

Myers argues a retrial is warranted because the trial court prejudicially erred when it did not sua sponte instruct the jury under CALCRIM No. 3406 (mistake of fact).⁸ He maintains the lack of a mistake-of-fact instruction prevented the jury from properly considering whether he acted with the criminal negligence necessary for an involuntary manslaughter conviction.

To the contrary, the People argue there is no need for a retrial. In support of their position, the People assert: (1) substantial evidence supports a conviction for involuntary manslaughter; (2) the court had no sua sponte obligation to provide a mistake-of-fact

⁸ CALCRIM No. 3406 provides: "The defendant is not guilty of _____<insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact. [¶] If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____<insert crime[s]>. [¶] If you find that the defendant believed that _____<insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____<insert crime[s]>. [¶] If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____<insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes)."

instruction; and (3) any instructional error was harmless. The People have the better argument.

The parties dispute whether it was error for the trial court to not sua sponte provide a mistake-of-fact instruction. However, we need not resolve this dispute because, even if we assume the trial court erred, Myers was not prejudiced.⁹

Involuntary manslaughter is, generally, a lesser included offense of murder. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) It is defined as the unlawful killing of a human being without malice, "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection" or "in the commission of an unlawful act, not amounting to felony." (§ 192, subd. (b).) Involuntary manslaughter is " 'inherently an *unintentional* killing.' " (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.) Criminal negligence is the governing mens rea for involuntary manslaughter. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1007 (*Butler*).)

"Criminal negligence has been defined in a variety of ways. In *People v. Penny* [1955] 44 Cal.2d [861,] 879, the court explained: ' "[C]riminal negligence" ' exists when

⁹ Myers contends the failure to provide a mistake-of-fact instruction allowed the prosecutor to present an incorrect legal theory that implied malice could be found based on Myers failing to check the chamber of his gun to ensure it was not loaded. Further, Myers insists the jury relied on this theory in convicting him of second degree murder; thus, reversal is required based on that instructional error. However, as we discuss *ante*, substantial evidence does not support Myers's conviction for second degree murder, and we reverse his conviction for murder on that basis. Consequently, Myers's claim that the absence of a mistake-of-fact instruction prejudiced him as to the murder count is moot. We therefore do not address that issue.

the defendant engages in conduct that is ' "aggravated, culpable, gross, or reckless" '; i.e., conduct that is ' "such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences." ' "Similarly, in *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440, the court stated that criminal negligence exists 'when a man of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm.' " (*Butler, supra*, 187 Cal.App.4th at p. 1008.)

Here, the evidence supports a conviction of involuntary manslaughter on a criminal negligence theory. After drinking several beers throughout the day, shooting at a street sign, reloading his gun, and then dropping the magazine out of the gun, Myers placed the gun in S.K.'s mouth, and pulled the trigger. He did so without checking to see if the bullet was in the chamber and while ignoring many of the safety guidelines he had been taught. Unintentional killings resulting from the negligent handling of firearms frequently support a verdict of involuntary manslaughter. (See *People v. Carmen* (1951) 36 Cal.2d 768, 776; *People v. Sica* (1926) 76 Cal.App. 648, 651; *People v. Ramirez* (1979) 91 Cal.App.3d 132, 139; *People v. Velez* (1983) 144 Cal.App.3d 558, 565 (*Velez*).) Pointing a firearm at another person, in the erroneous belief that the firearm is not loaded and with no intention of killing or harming the other person, qualifies as involuntary manslaughter: "[W]here the death of a human being results from playing or skylarking with or the reckless handling of firearms, it is involuntary manslaughter, the killing being the result of the commission of a lawful act which might produce death,

without due caution and circumspection." (*Sica*, at p. 651, cited with approval in *Carmen*, at p. 776; accord, *Velez*, at pp. 565-566.)

And Myers concedes the jury could have found he acted with criminal negligence when he pulled the trigger. Nevertheless, he maintains the omitted mistake-of-fact instruction would have made clear that an objectively reasonable mistake of fact would negate the mens rea of criminal negligence. We reject this argument for two reasons.

First, we fail to grasp how Myers's actions on the night in question can be viewed as anything but criminally negligent. A gun is not a toy. It should not be handled by someone who has been drinking. Under California law, a defendant who uses a gun in the commission of the crime is subject to severe penalties. (See, e.g., §§ 12022.5, 12022.53.) Simply put, a gun is an instrument capable of destruction and, when used improperly, like here, it can produce devastating consequences, even if they were unintended. Thus, before placing a gun in another person's mouth and pulling the trigger, an ordinarily prudent or careful person would make certain the gun was not loaded. Myers admits that he did not do so. Without a doubt, he was criminally negligent.

Second, based on the record before us, the lack of a mistake-of-fact instruction did not prevent the jury from properly considering whether Myers acted with the criminal negligence necessary for an involuntary manslaughter conviction. (See *Velez*, *supra*, 144 Cal.App.3d at pp. 565-567.) In *Velez*, the defendant, a police officer, playing around, pointed a gun he believed to be unloaded at a civilian office aide. The gun discharged, killing the aide. The defendant admitted firing the shot but testified that he did not know how a round got into the chamber. (*Id.* at p. 562.) Rejecting the defendant's argument

that he was entitled to a mistake-of-fact instruction, the appellate court held that for the defendant to be guilty of involuntary manslaughter under the facts of that case, "it was only necessary for [the defendant] to fail to perceive the risk of pointing a potentially hazardous weapon at [the victim]." (*Id.* at pp. 565-566.) Because the prosecution did not need to prove criminal intent to prove the defendant was guilty of manslaughter, mistake of fact would not have negated any element of that offense. Therefore, the appellate court concluded the trial court did not err in refusing to provide a mistake-of-fact instruction, even when there existed evidence that the defendant was operating under one. (*Id.* at pp. 565-567.)

This case is analogous to *Velez*. Like the defendant in *Velez*, Myers did not think the gun had a bullet in the chamber. Further, like the defendant, Myers did not intend to kill the victim. Both Myers and the defendant in *Velez* merely were playing around. However, like the defendant in *Velez*, Myers did not appreciate the risk of placing a gun in S.K.'s mouth and pulling the trigger. Although Myers believed the gun was not loaded, he did not check the chamber to make sure. His actions were reckless and incompatible with a proper regard for human life. He was criminally negligent. A mistake-of-fact instruction would not alter that fact.

For these reasons, we find the evidence sufficient to support a conviction of involuntary manslaughter against Myers. We thus modify the judgment to so reflect. (See § 1181, subd. (6); *Navarro, supra*, 40 Cal.4th at p. 675-676.)

DISPOSITION

The judgment is modified to reflect that Myers was convicted of involuntary manslaughter. Myers's sentence is vacated. This matter is remanded to the superior court with directions to resentence Myers consistent with this opinion. Upon resentencing Myers, the superior court is to amend the abstract of judgment to reflect Myers's conviction for involuntary manslaughter as well as the new sentence and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.